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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1441

KEVIN H. WHITE,
Mayor of the City of Boston,

Petitioner,

—v.—

TALLULAH MORGAN, *et al.*, and
JOHN J. KERRIGAN, *et al.*,

Respondents.

REPLY BRIEF FOR PETITIONER

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1. This case presents two important issues concerning the extent to which, as a matter of law, courts are precluded from considering such practicalities as comparative costs, community support, amount of busing, and potential for resegregation in choosing among a number of plans, each of which will eradicate school segregation. In petitioner's view these issues are of major significance not only to Boston but to the future of meaningful desegregation and civic vitality in urban areas throughout the country.

This view has received strong support before this Court. First, the Cities of Cleveland and Wilmington have filed a Brief Amici Curiae supporting a grant of certiorari and detailing the impact of this litigation on these two and other similarly situated cities. Second, the Solicitor General of the United States in his recent oral argument in *Pasadena Board of Education* v. *Spangler*, O.T. 1975, No.

75-164 (argued April 27-28, 1976), indicated to the Court that, in his view, the Court should seriously consider a grant of certiorari in an appropriate case to examine the law on school desegregation remedies. (Tr. 29-30.) This is such a case.

2. Although they attempt, as we note later (pages 4-7 below), to present this case to the Court on a factual basis explicitly rejected by both the Court of Appeals and the District Court, the Respondents Morgan *et al.* (hereinafter "Private Respondents") and Massachusetts Board of Education (hereinafter "Board Respondents") barely mention the important legal issues presented to the Court for the first time by this petition.

(a) *The Refusal to Consider Practicalities.* As we demonstrated in our Petition at pages 20-21 and 27, the District Court in issuing its desegregation plan, and the Court of Appeals in affirming it, held that such factors as the amount of busing, cost, community acceptance, and potential for resegregation could not be considered by a court in choosing between satisfactory but different plans to remedy urban school segregation. (App. 19a; 29a-32a; 71a-72a; 102a-103a). As a consequence, the courts below chose to impose the most costly plan, the plan most burdensome to students, the plan least acceptable to the community, and the plan most likely to cause resegregation in the schools. This result is contrary to the Court's commands in *Davis* v. *Board of School Commissioners,* 402 U.S. 33, 37 (1971), and *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 31 (1971), to adopt "realistic," "effective," and "practica[l]" plans. It is also contrary to common sense and the principles of equity and unnecessarily disruptive of a city's social fabric to impose

extreme remedies where moderate ones will fully cure constitutional violations. See *Brown* v. *Board of Education II*, 349 U.S. 294, 300 (1955).

The Private Respondents' brief does not even address this critical legal issue. The Board Respondents' only comment on this legal issue is to repeat the holding of *United States* v. *Scotland Neck City Board of Education*, 407 U.S. 484, 490-91 (1972), that such factors cannot be considered in determining whether a plan is constitutionally satisfactory. (Board Br. Op., p. 15.) As pointed out in the Petition at pages 29-31, that is true but irrelevant because the issue here is whether such factors may be considered in choosing *between* constitutionally adequate alternatives.

(b) *The Equal Educational Opportunities Act of 1974.* In view of this Court's finding in *Swann* v. *Charlotte-Mecklenburg Board of Education, supra*, 402 U.S. at 14, that school desegregation remedies had been "imperfect," Congress passed the Equal Educational Opportunities Act of 1974, 20 U.S.C. §§ 1701 *et seq.* The Act was not intended to diminish the courts' authority to remedy constitutional violations, but was designed to end unnecessary busing by explicitly precluding the imposition of busing orders more severe than necessary to remedy particular constitutional violations. 20 U.S.C. §§ 1702, 1712. Despite the plain meaning of the Act, however, the Court of Appeals held that once the District Court found that some busing was necessary to accomplish desegregation, the Act had no effect whatever and the District Court had unfettered discretion to order however much busing it chose:

> "Since this argument [that the Act precluded the District Court from ordering more busing than constitutionally required] concerns the District Court's dis-

> cretion in determining the adequacy of the remedy, and, therefore, gains nothing from the Act, which leaves that discretion unaffected, it must stand or fall upon those traditional principles of equity which would govern this issue even were the Act not in existence." (App. 17a-18a.)

Both Respondents' arguments to this Court are simply a repetition of the Court of Appeals' contentions on this issue. (Br. Op., pp. 16-17; Board Br. Op., pp. 19-20.) These contentions entirely disregard the explicit contrary language of 20 U.S.C. § 1712 and, of course, render the Act meaningless. Such a result is plainly wrong, not only because it totally disregards a clear congressional judgment on an important matter of social policy, but also because it is disruptive of meaningful and long-lasting desegregation in Boston and elsewhere.

3. For the most part, both Respondents' claims come down to a recitation of contentions which they insist show that the Masters' plan would not have provided a constitutionally satisfactory remedy for the segregation found to exist in the Boston school system and that, accordingly, the important issues described above are not actually presented in this case. (Br. Op., pp. 3-6, 10-14; Board Br. Op., pp. 6-7, 19.) That claim suffers from two fundamental defects.

(a) *The Masters' Plan Was Never Found To Be Constitutionally Deficient.* Both the District Court and the Court of Appeals conspicuously declined to find that the Masters' plan was constitutionally insufficient or that the added burden imposed by the District Court's plan under review here was necessary for a constitutionally sufficient

remedy. The trial judge stated in open court that in choosing between the Masters' plan and the plan involved here "constitutional considerations [were] only secondary . . . ." Transcript of April 15, 1975, Hearing, pp. 7-8, 32. Moreover, the Court of Appeals stated that the differences between the Masters' and District Court's plans in amount of desegregation, although "not trivial," were "slight" and indicated that it could not determine that the differences between the Masters' plan and the District Court's plan were of constitutional significance. (App. 20a.) Thus, Respondents' major claim as to the Masters' plan not only has no basis at all in the record but was rejected by both lower courts.

(b) *Without Regard to the Masters' Plan, the Lower Courts Were Obligated To Formulate the Least Burdensome Constitutionally Adequate Plan.* By belaboring the Masters' plan and peripheral questions of its adequacy, Respondents misconceive the thrust of the Mayor's Petition. While we believe the Masters' plan was a satisfactory alternative, that is not essential for the legal question presented by the Petition. The point is that the courts below were obligated, both by traditional principles of equity and by the Equal Employment Opportunities Act of 1974, to consider the factors discussed in the Petition and to formulate a constitutional remedy which does not impose unnecessary burdens on the community. This is a duty the courts had regardless of the adequacy of the Masters' plan, and this the courts refused to do. The simple fact is that neither court below ever found that the District Court's plan, with its expensive, burdensome, and disruptive requirements, was the only, or the least onerous, satisfactory alternative for desegregating Boston's schools.

4. Respondents next claim that the Masters' plan projections were inaccurate and that the Masters' plan would not have worked. (Br. Op., pp. 2-5; Board Br. Op., pp. 7-8, 11-13.) In Petitioner's view, these subsidiary factual claims Respondents seek to raise are irrelevant to the pending legal issues for the reasons described in the preceding section. They are also incorrect.

Respondents base their claims on the contention that more recent data provided by the School Department after the Masters had rendered their recommendations demonstrated inaccuracies in the number of places available in certain schools and the racial composition of the the student bodies. In fact, the compiler of the data testified that the new numbers were not significantly different from the data upon which the Masters' plan was based.[1] Numbers in this area are only estimates even of the situation which will develop between their collection and publication, much less of a future school year. As demonstrated by the table on page 23 of the Petition[2] it has turned out that the actual

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[1] Deposition of John Coakley, chief desegregation planner, Boston School Department Educational Policy Center, p. 51. As described in the Petition at pages 19-20, the District Court neither consulted the Masters about the new data nor attempted to make technical adjustments in the Masters' plan to overcome the changes supposedly shown by the new data. Rather, he abruptly rewrote the Masters' plan.

[2] Respondents claim that the data set forth in the table on page 23 of the Petition are inaccurate. In fact, these data are taken from Appendix E of the Masters' Report, for the Masters' plan; from the District Court's opinion, for the District Court's plan; and from actual enrollment data submitted to the District Court on February 9, 1976, for actual enrollments. The figures used exclude kindergarten because kindergarten students are not part of the District Court's plan and because including kindergarten skews the racial composition of the school district enrollment. Evidently, due to a lack of parochial and private school kindergartens in and around Boston, many students who attend such schools commencing in first grade attend public school kinder-

enrollments as of February 6, 1976, were closer to those predicted by the data used by the Masters' plan than by the data used by the District Court.

It is in large part due to the superiority of the data used by the Masters that the Private Respondents are now compelled to admit that the District Court's plan "is not so desegregative as hoped." (Br. Op., p. 5.) The Board Respondents, however, contend that it is unfair to judge the District Court's plan by its actual performance. They claim that since the District Court's plan did not work out as predicted, it is reasonable to infer that the Masters' plan would also have been less successful than predicted. (Board Br. Op., p. 9.) This argument ignores the critical fact that the District Court's plan was less successful than predicted precisely because the court in imposing the plan refused to consider the factors such as community acceptance and resegregation discussed in the Petition at pages 16-18, whereas the Masters' plan had carefully considered each of them.

5. Both Respondents also suggest that the lower courts actually considered factors such as the amount of busing, cost, community acceptance, and potential for resegregation. (Br. Op., pp. 2-3, 10-14; Board Br. Op., pp. 13-17.) Respondents' statements in this regard are incorrect. In fact, the lower courts simply had no clear picture of the legal standards to be applied in the present case and as a result refused to consider these important factors.

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gartens. The result is that Boston's kindergartens are now approximately 65% white while the rest of the school system is now less than 50% white. Accordingly, the table reproduced as Appendix A to the Board's Brief in Opposition, which apparently includes kindergarten students, simply presents a misleading picture of the school population.

(a) *Amount of Busing.* Respondents contend that reduction of busing was a "repeatedly emphasized goal" in the Courts below. (Br. Op., p. 2; see also Board Br. Op., p. 13.) In support of this proposition, they cite statistics dealing with the length of the bus rides, with the percentage of the total students bused, and with the number of students bused under a prior State plan.[3] None of this litany of statistics is relevant to the present issue. The salient fact is that the Masters' plan would have accomplished the same amount of desegregation by busing 15,000 students instead of the District Court's 21,000 students[4] and that the courts below failed to compare the plans on this basis.

(b) *Costs.* Both Respondents state that the courts below made findings as to costs. (Br. Op., p. 2; Board Br. Op., p. 16.) We agree that the District Court made some findings with respect to the costs of its own plan. What it failed to do was to make any findings with respect to the cost of the Masters' plan, or any findings relating to the increase in costs imposed under its plan by virtue of the

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[3] They also cite statistics to the effect that 30,000 students either were bused or used public transportation prior to the desegregation plan. (Br. Op., pp. 2, 17; Board Br. Op., pp. 5, 14.) Even if true, this shows nothing because it compares students *voluntarily* using public transportation to those *mandatorily* bused under the present plan.

[4] The Board Respondents quarrel with these numbers. (Board Br. Op., pp. 9-10.) These figures are taken from the District Court's opinion for its plan (App. 77a), and from the Masters' Report, for the Masters' plan (M. R. 51-52). The District Court made no finding which suggested the inaccuracy of either figure. The Court of Appeals did suggest that the Masters' number might be "open to some doubt" (App. 14a and 15a n.14) but it expressly declined to make any finding in that regard. Indeed, in its decision the Court of Appeals assumes the correctness of both the Masters' and the District Court's numbers. (App. 14a-15a.)

greater amount of busing, need for greater numbers of school safety personnel, and the like.

(c) *Community Acceptance and Resegregation.* Respondents claim that the lower courts considered community acceptance and avoidance of resegregation and simply concluded that no such problems with the plan imposed were proven. (Br. Op., pp. 13-14; Board Br. Op., pp. 15-16.) In fact, the lower courts did no such thing. Rather, with respect to resegregation, the District Court merely referred in a footnote to the Masters' finding on the subject, which it did not adopt on the grounds that consideration of resegregation "would be presumptuous." (App. 71a, n. 7.) Moreover, both the Court of Appeals and the District Court found that considerations of community acceptance and potential for resegregation were irrelevant and could not be considered by the courts. (App. 19a, 29a-32a, 71a-72a.)

6. Finally, the Private Respondents, without making any particular legal argument in this regard, complain generally that a number of the defendants urged different and even inconsistent positions on the courts below. It is quite true that Petitioner White, the Mayor of Boston, has taken a different position in this litigation than others of the defendants below. The Mayor was not a party to this litigation during the District Court's consideration of liability and no party has ever suggested that the Mayor had any responsibility for segregation of the Boston schools. It is, therefore, understandable that the Mayor's position has been different from that of the other parties defendant. Indeed, throughout his participation in the Boston school desegregation litigation, the Mayor's view has been that

the school children of Boston are entitled to remedies necessary to satisfy the requirements of the Constitution.

This does not mean, however, that the Mayor must agree with Respondents in their pursuit of the most extreme remedy. Unlike Respondents, and, for that matter, unlike the School Committee, the Mayor has overall responsibility for the City's public safety, finances, and general welfare. The Mayor's interest in these proceedings is the maintenance of Boston's social stability and financial integrity among the far reaching changes required to protect the constitutional rights of the City's school children. For this reason, the Mayor consistently urged the courts below to consider the practicalities of the situation in restructuring the City's schools in order to avoid a disruptive impact on the social framework of the City, on the City's ability to meet the needs of its residents, and on the prospects for meaningful desegregation.

CONCLUSION

For the reasons stated in the Petition and in this Reply, the issues raised by this Petition are of major importance to the future of meaningful desegregation in the Nation's cities and are worthy of full consideration by this Court. The Petition for Certiorari should be granted.

Respectfully submitted,

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